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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN HENRY ZAMORA,

Defendant and Appellant.

B208196

(Los Angeles County  
Super. Ct. No. KA069138)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy-Powell, Judge. Modified and, as so modified, affirmed.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Steven Henry Zamora appeals from the judgment entered following a jury trial that resulted in his conviction for first degree murder. Zamora was sentenced to a prison term of 75 years to life, plus 10 years.

Zamora contends the trial court committed instructional error; erred by concluding his prior conviction for violation of Penal Code section 246.3<sup>1</sup> was a “strike”; improperly imposed a court construction penalty; and abused its discretion when it ordered him to pay \$5,000 to the Victim Compensation Board. We modify the judgment with respect to the trial court’s imposition of various fines and penalties. In all other respects, we affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

#### 1. *Facts.*

##### a. *Background.*

Appellant Zamora, Frankie Martinez, and Ralph Flores were members of the Azusa 13 criminal street gang, a gang associated with the Mexican Mafia. Azusa 13 had a reputation as a “very violent gang,” and its members were known to kill persons believed to be informants, or who had not paid “taxes” to the gang for the privilege of dealing drugs in the area claimed as the gang’s territory.

Martinez was a drug dealer, and came from a “multi-generational gang family.” He lived at his aunt’s house, located in Azusa on Neerfield Street. Flores and Zamora were more senior members of the gang than was Martinez. Zamora lived in the garage of a house located on Duell Street that was used by numerous gang members as a place to socialize and ingest drugs. Martinez’s cousin, Anthony Almarez, was an associate of the gang. Roberta Romero was likewise an associate of the gang, and was friends with both Martinez and Almarez.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

The victim, 28-year-old Fenise Luna, was a heavy user of methamphetamine. Approximately one year before the murder, Almarez had introduced Martinez to Luna, and Martinez became her drug supplier. Martinez and Luna spent considerable time together. In approximately April 2004, Luna received a check for \$35,000 for a workers' compensation award. She deposited the money in the bank.

b. *Martinez's account of Luna's murder.*

On the afternoon of December 28, 2004, Luna dropped \$40 off with Martinez for a methamphetamine purchase, with the understanding Martinez would provide the drug to her later. Martinez attended a nearby family party from approximately 4:00 p.m. until midnight. He obtained a small amount of methamphetamine for Luna at the party. However, he was low on the drug and needed to replenish his supply.

Near midnight, Martinez returned to his residence on Neerfield Avenue. Almarez and Romero stopped by to see him, seeking methamphetamine. At some point, they were joined by Flores. The foursome drove in Romero's Honda to a location where Martinez unsuccessfully attempted to obtain methamphetamine. Luna telephoned Martinez, inquiring about her methamphetamine order. Flores asked Martinez who was calling. Upon learning that it was Luna, Flores stated that he needed to talk to her. Martinez told Luna he had her methamphetamine, and also asked her for a ride. Luna, who had been smoking methamphetamine with friends in Glendora, agreed to come to Duell Street to pick Martinez up. She explained to her niece that she did not want Martinez to have to walk in the rain.

As Luna was en route, Romero drove Flores, Almarez, and Martinez to Zamora's residence on Duell Street. Romero dropped Martinez and Flores off and, at the direction of either Flores or Zamora, she and Almarez drove around the corner and waited for the men to return.

Shortly thereafter, Luna arrived at Duell Street, driving her white Ford Expedition. Zamora, Flores, and Martinez all entered Luna's vehicle. The group travelled to a nearby house where Martinez again unsuccessfully attempted to obtain more methamphetamine.

Luna then drove them back to the Duell Street house. Flores invited Luna inside to smoke methamphetamine with them.

Inside the garage, Flores, Zamora, Martinez, and Luna settled onto couches and a recliner. After Luna smoked some methamphetamine, she passed the pipe to Zamora. Instead of taking the pipe, however, Zamora produced a taser and tased Luna in the neck. The taser apparently malfunctioned and had no effect on Luna. She stood up, “freaked out,” and asked what was going on. Zamora punched Luna in the face, causing her to fall, hitting her head hard on the ground. Her nose began bleeding. Flores then punched Luna in the face numerous times. Luna screamed for Martinez to help her, and begged the men to stop. Martinez claimed he was surprised by the attack and felt Luna was “a good person,” but believed he could not come to her aid because Flores and Zamora were more senior gang members than he was.

Flores told Martinez to fetch some rope and tie Luna up. Martinez found some blue rope in a box, and Flores placed it around Luna’s neck. Flores told Martinez to sit on Luna because she was fighting too hard. Luna, who was lying on her stomach and crying hysterically, continued to plead for help and repeatedly asked, “ ‘why’[?]” Flores choked Luna hard, alternately tightening and loosening the rope. Zamora left the garage without saying anything while Luna was being strangled by Flores. After a few minutes, Martinez got off Luna, who was still alive but had stopped resisting. Martinez left the garage and joined Zamora outside.

Martinez telephoned Almarez and Romero and told them to come pick him up. He and Zamora reentered the garage. Martinez observed that Luna was dead. He wondered “[w]hy they got to kill her. And, you know, it is messed up.” Without saying anything, Zamora began hog-tying Luna’s body with the rope and strips of a bed sheet. Flores joined him, and told Martinez to assist them in wrapping her body in a sheet. Flores told Martinez to turn Luna’s Expedition around in the driveway. Almarez and Romero arrived at the house, and Almarez assisted Flores and Zamora in moving Luna’s body into the Expedition. At Flores’s direction, Martinez used a large board to block their actions from the neighbors’ view.

At Flores's order, Martinez drove the Expedition to a random location in a residential neighborhood several minutes away. Flores accompanied him, while Zamora stayed behind to clean up the blood in the garage. Romero and Almarez followed in the Honda. The men abandoned the Expedition, and Romero gave them a ride back to their respective residences. Flores warned the others, " 'Don't say nothing.' "

*c. Romero's testimony.*

Romero testified that Almarez needed money for a lawyer and hoped to obtain funds from Luna. However, Almarez and Luna had had a disagreement and were not on speaking terms at the time of the murder. Accordingly, Martinez planned to ask Luna for the money. When Romero, Martinez, and Almarez were together in the early morning hours before the murder, Martinez and Almarez talked briefly about "calling Fenise" and Almarez's "problem with his lawyer."

When Romero dropped Martinez and Flores at Zamora's Duell Street residence, one of them told her to wait around the corner until Martinez signaled to return. Romero believed Martinez was going to ask Luna for the money, and did not want Luna to see Almarez. Obediently, after dropping Martinez and Flores off with Zamora, Romero and Almarez parked the Honda around the corner and waited. Martinez telephoned and spoke to Almarez four times while Almarez and Romero waited in the Honda. After an hour had passed, Romero and Almarez visited a nearby residence where they smoked methamphetamine for 15 to 20 minutes. At that point, they received Martinez's call asking them to return to Duell Street. They returned and waited for approximately another half hour.

Martinez and Flores came out of the garage and spoke to Almarez. Almarez then assisted them in moving Luna's wrapped body into the Expedition, while Romero used her car to shield the men's actions from view. Romero and Almarez followed as Martinez, accompanied by Flores, drove the Expedition to a residential location several minutes away. Martinez and Flores abandoned the Expedition and joined Romero and Almarez in the Honda. They were breathing heavily and appeared nervous. Flores said,

“ ‘The ta[s]er didn’t work.’ ” Flores also stated that Zamora “cracked her and she fell and hit her head on the floor.”

d. *Discovery of Luna’s body and investigation.*

On December 29, 2004, police officers discovered Luna’s Expedition, with her body inside. Her arms, legs, and head had been hog-tied with blue rope and strips of a bed sheet. All but one of her long, acrylic nails were broken off.

An autopsy disclosed that Luna died from asphyxiation due to ligature strangulation. She had bruising on her knees, legs, back, and buttocks, indicating blunt force trauma. The bruises on her knees could have been caused by falling; the other bruises indicated she was beaten. She had serious swelling and bruising over her left eye, abrasions on her nose, and wounds to her hands that might have been defensive wounds. There were ligature marks on her neck and ankle. The cause of death was asphyxiation caused by ligature strangulation. Her injuries were consistent with strangulation, but not with hanging.

In July 2005, Detective Michael Rodriguez conducted an audiotaped interview with Howard Covarrubias. Covarrubias, a drug user, told Rodriguez he had encountered Zamora near the Duell Street garage after reading an article about Luna’s murder. Covarrubias told Zamora that the newspaper article indicated Luna died as the result of a “hot shot.” Zamora boasted that Luna had been playing darts when he came up behind her, strangled her, hung her from the garage rafters, and instructed a junior gang member with a tattoo on his lip to “finish the job.”<sup>2</sup> Flores had a tattoo reading “Azusa” across his upper lip. When the garage was examined approximately one year after the murder, the remnants of a blue rope like that found on Luna’s body were observed hanging from the rafters.

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<sup>2</sup> At trial, Covarrubias denied making the statements and denied it was his voice on the tape of the interview. He also stated that he had been suffering from the symptoms of heroin withdrawal when he spoke to the detective, and believed they were discussing not Zamora, but a different individual.

Detective Phillip Martinez interviewed Zamora's cousin, Anthony Padilla, in October 2005. Padilla stated that, a few days after the homicide, he read a newspaper article about the killing. At around the same time, he visited a "dope house" in Azusa where he overheard two Azusa 13 gang members named Flaco and Fernando discussing the killing. When they saw Padilla, and presumably realized he had heard their conversation, they looked startled and upset. A week and one-half later, Padilla ran into Zamora at a motel. Zamora grabbed him by the collar and said, " 'I know what you know, and if you tell anybody I will kill you.' " <sup>3</sup>

Deputy Sheriff Anthony Paez worked at the Men's Central jail, where Zamora was being held prior to trial. Zamora told Paez that he had fled to Mexico because he believed that if he was extradited back to the United States, "he would not get the death penalty, only a life sentence."

The People presented evidence related to the section 186.22, subdivision (b) gang enhancement. <sup>4</sup>

## *2. Procedure.*

Zamora and Flores were tried together by separate juries. Zamora was convicted of first degree murder (§ 187, subd. (a)). The jury found the crime was committed for the benefit of, at the direction or, or in association with a criminal street gang (§ 186.22, subd. (b)(1)). The jury was unable to reach a verdict on three special circumstance allegations, i.e., that (1) the murder involved the infliction of torture (§ 190.2, subd. (a)(18)); (2) the murder was committed while Zamora was engaged in the commission or attempted commission of robbery (§ 190.2, subd. (a)(17)(A)); and (3) Zamora was an active participant in a criminal street gang and the murder was carried

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<sup>3</sup> At trial, Padilla claimed he had lied to the detective and the encounter with Zamora never occurred.

<sup>4</sup> Because Zamora does not challenge the sufficiency of the evidence to prove the gang enhancement, we do not detail it here.

out to further the gang's activities (§ 190.2, subd. (a)(22)). In a bifurcated proceeding, the trial court found Zamora had suffered three prior serious or violent felony convictions (§§ 667, subds. (a), (b)-(i) & 1170.12, subds. (a)-(d)).<sup>5</sup> It imposed a prison term of 75 years to life, plus 10 years. The trial court further imposed the following fines: (1) a \$10,000 restitution fine (§ 1202.4, subd. (b)); a \$10,000 suspended parole restitution fine (§ 1202.45); \$5,425.51 in victim restitution (§ 1202.4, subd. (f)); \$5,000 to the Victim Compensation Board; a \$5,010 court construction fine; and a court security assessment. Zamora appeals.

## DISCUSSION

1. *The trial court did not prejudicially err by instructing the jury on felony murder.*

a. *Additional facts.*

The jury was instructed on willful, deliberate, premeditated murder, felony murder based upon robbery, and second degree murder. (CALJIC Nos. 8.00, 8.10, 8.11, 8.20, 8.21, 8.21.1, 8.27, 8.30 & 8.31.) The prosecutor advanced both the felony-murder and premeditated murder theories during argument. The prosecutor hypothesized that Luna had agreed to provide money for Almarez's lawyer, but changed her mind after she and Almarez had a disagreement. Martinez, Zamora and Flores beat, tortured, and ultimately killed Luna in an effort to get her to provide the money, and to send a message to the community that refusing gang members' demands was dangerous. After approximately four days of deliberation, during which it requested readback of Martinez's, Romero's, and Paez's testimony, the jury rendered a general verdict of first degree murder. The jury deadlocked on the questions of whether the murder was committed during a robbery or attempted robbery, whether the murder involved the infliction of torture, and one of the gang allegations. The court declared a mistrial on those allegations. The foreperson indicated jurors were divided roughly 10 to 2 with regard to the allegation the murder

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<sup>5</sup> The trial court struck the allegation that Zamora had served a prior prison term within the meaning of section 667.5, subdivision (b).

was committed during the course of a robbery, but did not clarify whether the majority believed the allegation true or not.

b. *Discussion.*

Robbery is the felonious taking of personal property in the possession of another, from his or her person or immediate presence, and against his or her will, accomplished by means of force or fear, with the specific intent to permanently deprive the person of the property. (§ 211; *People v. Burney* (2009) 47 Cal.4th 203, 234; *People v. Gomez* (2008) 43 Cal.4th 249, 254.) Zamora contends the trial court prejudicially erred by instructing the jury on first degree felony murder because there was insufficient evidence Luna was killed during the course of a robbery or attempted robbery. He urges that there was no evidence the killers took, or attempted to take, any property from Luna's immediate presence. He argues that the evidence showed the \$35,000 had been deposited in the bank, and was not on Luna's person, at the time of the crime, and there was no showing the assailants took or attempted to take any other property from her.

Zamora points to *People v. Hayes* (1990) 52 Cal.3d 577, 627, which construed the "immediate presence" element of robbery. *Hayes* reasoned: "A taking can be accomplished by force or fear and yet not be from the victim's immediate presence. For example, a person might enter the victim's home and there, by the use of force or fear, compel the victim to reveal the combination of a safe located many miles away in the victim's office. The culprit at the victim's house could then relay the combination to a confederate waiting in or near the office, who could use it to open the safe and take its contents before the victim could reach the office or otherwise interfere with the taking. In such a case, the criminals would have accomplished the taking by force or fear and yet not have taken property from the person or immediate presence of the victim. The perpetrators of the taking would be guilty of several offenses—conspiracy, burglary, assault, and grand theft at the least—but they would not be guilty of robbery as defined in section 211 because the taking would not be from an area over which the victim, at the time force or fear was employed, could be said to exercise some physical control."

(*Id.* at p. 627.) Further, Zamora urges that there was no evidence the killers formed the intent to rob Luna prior to the killing.

We agree that the trial court erred by instructing on felony murder occurring during the course of a robbery or attempted robbery, because there was insufficient evidence to support the theory. There was no evidence anything was actually taken from Luna. There was likewise no evidence the killers *attempted* to rob Luna of anything. If the jury credited Martinez's testimony, he did not understand why Luna was being killed and did not know she had come into a substantial sum of money. Neither he, Flores, nor Zamora demanded money or property from Luna during the killing. In fact, according to Martinez, Luna repeatedly asked why the men were attacking her, but received no response. Nothing in Martinez's account suggests the killing was carried out during an attempted robbery.<sup>6</sup>

If the jury credited Romero's account of the evening's events, there was some evidence Almarez wanted money from Luna, and Martinez was going to ask her for it. Further, according to Romero's account, Luna, Martinez, Zamora, and Flores were together for at least an hour and a half, potentially contradicting Martinez's testimony that the murder itself took only a few minutes. From this, the jury could have inferred that Martinez did not accurately describe the duration and details of the attack on Luna. Whichever account the jury credited, however, there was no showing that the group attempted to take any property from Luna's person or immediate presence. The jury could have inferred that the group terrorized and killed Luna because of a financial dispute, or for rebuffing a gang member's request for a loan or money, but not that the men attempted to rob her of anything on her person or in her immediate presence.

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<sup>6</sup> The men did take Luna's Expedition, of course, but no evidence suggested the men killed her in order to permanently deprive her of the vehicle. Instead, the Expedition was used solely as the means to dispose of her body and then abandoned minutes after it was driven. Indeed, the People do not contend, and did not argue at trial, that the murder was committed in order to rob Luna of her vehicle.

Likewise, nothing in Covarrubias's, Padilla's, or Paez's testimony suggested an attempted robbery.

In our view, however, the instructional misstep was manifestly harmless. When a jury is instructed on multiple theories, one of which is factually inadequate, "reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) When there is a general verdict in a case involving more than one factual theory, we presume the jury acted properly and relied on the supported theory, unless the record shows otherwise. (*People v. Lucas* (1997) 55 Cal.App.4th 721, 733-734.) In making this determination, we "assess the entire record, 'including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict.' [Citation.] We will affirm 'unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.' [Citation.]" (*People v. Perez* (2005) 35 Cal.4th 1219, 1233; *People v. Guiton, supra*, at p. 1129.)

Based on the entire record, we conclude it is not reasonably probable that, in finding Zamora guilty of first degree murder, the jury relied solely or primarily upon a felony-murder theory. The jury was unable to render a verdict on the robbery-murder special circumstance, demonstrating that at least some jurors did not believe a robbery or attempted robbery occurred, and did not convict on that basis.

The jury was instructed on at least one factually adequate theory, i.e., premeditated murder. Murder that is premeditated and deliberate is murder of the first degree. (§ 189; *People v. Burney, supra*, 47 Cal.4th at p. 235; *People v. Cole* (2004) 33 Cal.4th 1158, 1224.) " " " " "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " " " " (*People v. Burney, supra*, at p. 235; *People v. Jurado* (2006) 38 Cal.4th 72, 118.) " " " " "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting

thought and reflection rather than unconsidered or rash impulse.” [Citation.]’ ” (*People v. Burney, supra*, at p. 235; *People v. Jurado, supra*, at p. 118.) “ ‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” [Citations.]’ [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419.)

Three kinds of evidence are generally considered most relevant to prove premeditation and deliberation, i.e., motive, planning activity, and manner of killing. (*People v. Burney, supra*, 47 Cal.4th at p. 235; *People v. Jurado, supra*, 38 Cal.4th at pp. 118-119; *People v. Perez* (1992) 2 Cal.4th at 1117, 1125; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) These categories are not the exclusive means to establish premeditation and deliberation. Not all the factors need be present, or present in any particular combination, to sustain a first degree murder verdict. (*People v. Burney, supra*, at p. 235; *People v. Tafoya* (2007) 42 Cal.4th 147, 172; *People v. Lenart* (2004) 32 Cal.4th 1107, 1127.)

Here, the People’s evidence—which was clearly credited by the jury—unequivocally demonstrated that Flores and Zamora premeditated the murder. First, there was evidence of planning. Luna was lured to the gang’s Duell Street lair, where she was surrounded and outnumbered by three gang members. Without provocation or warning, Zamora tased Luna on the neck, in an obvious attempt to incapacitate her. Zamora had either brought the taser to the scene, or had it at the ready, concealed until an opportune moment arose for him to surprise and stun the victim. Flores’s comment while leaving the scene, that the taser had not worked, indicated both he and Zamora had planned the attack. After Zamora used the taser, he immediately hit Luna in the face, without provocation. Flores, acting in concert with Zamora, immediately followed suit and began to beat Luna with his fists. Flores’s command to Martinez to obtain rope, his purposeful strangling of Luna, and Zamora’s and Flores’s behavior after the killing, calmly and purposefully tying Luna’s body, also indicated the attack was preplanned.

These coordinated actions, involving the sudden use of a concealed weapon at an opportune moment and an unprovoked attack on the victim, necessarily demonstrated planning and premeditation.

There was also evidence of motive. Luna had declined to provide funding for a gang associate's legal defense, despite her receipt of a considerable sum of money. The jury could readily infer that the gang members killed her to punish her for her noncooperation and to strike fear into the community.

Third, the method of killing strongly pointed to premeditation and deliberation. The prolonged and coordinated attack was carried out by several assailants. No evidence suggested a quarrel or a frenzied, unplanned explosion of violence. Significantly, Luna was strangled with a ligature. Ligature strangulation is, by its nature, a deliberate act. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1020; *People v. Stitely* (2005) 35 Cal.4th 514, 544; *People v. Bonillas* (1989) 48 Cal.3d 757, 792.) In short, the evidence showed a prolonged, purposeful, coordinated lethal attack by several men on a defenseless and vulnerable woman. In our view, no reasonable jury that credited the People's evidence could have failed to find premeditation and deliberation. Indeed, the evidence of premeditation and deliberation was much stronger than the evidence of attempted robbery. Under these circumstances, it is inconceivable the jury rejected the premeditation theory and found Zamora guilty only on a robbery-murder theory.

Zamora points to several factors which he contends demonstrate the jury relied upon the felony murder theory, i.e.: (1) the jury deadlocked 10 to 2 on the robbery special circumstance; (2) the jury took over four days to decide the case; (3) the jury asked for readback of the testimony of Martinez, Romero, and Paez; and (4) the prosecutor argued the felony-murder theory. None of these facts indicate to us, however, that jury relied solely on the robbery-murder theory, or that the result would have been more favorable to Zamora had felony murder instruction been omitted. *After* reaching a verdict on the murder charge, the jury indicated it was deadlocked on the special circumstances allegations, including the allegation that the murder was committed during the course of a robbery or attempted robbery. The jury's deadlock indicates that some jurors believed

the killing was carried out during a robbery, and some did not. The deadlock does not suggest that any juror rejected the overwhelming evidence of premeditation and deliberation. That the jury spent approximately four days deliberating, and asked for the readback of testimony, does not in any way indicate it rejected the premeditation and deliberation theory. The jury was asked to make findings on three special circumstance allegations, as well as a gang allegation. The jury's deadlock on all three special circumstance allegations readily explains the length of deliberations. Further, the prosecutor did not abandon the premeditation and deliberation theory, but argued both theories to the jury. The jury did not ask any questions or make any statements suggesting it had rejected the premeditation theory, which, as we have discussed, was considerably stronger than the felony-murder theory.

In sum, viewing the record as a whole, and given the overwhelming nature of the evidence establishing premeditation and deliberation, there is no probability the jury found Zamora guilty solely on the felony-murder theory, or that the outcome would have been more favorable for Zamora had the challenged instructions been omitted. (See *People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) The instructional error was harmless.

*2. Use of prior conviction for violation of section 246.3 as a strike.*

The information alleged that Zamora had suffered three prior “strike” convictions, i.e., a conviction in 1999 for making criminal threats (§ 422) in case No. KA042307, and convictions in 1992 for violating sections 246 (discharge of a firearm at an inhabited dwelling or occupied motor vehicle) and 246.3 (grossly negligent discharge of a firearm or BB gun), both in case No. KA012644. After a bench trial on the prior conviction allegations, the trial court found Zamora had suffered the convictions, which it characterized as “strike priors.” It sentenced Zamora to a term of 25 years to life, tripled pursuant to the Three Strikes law to 75 years to life. It also imposed two five-year serious felony enhancements pursuant to section 667, subdivision (a)(1).

Zamora does not challenge the sufficiency of the evidence to prove the prior convictions, or that the section 422 and section 246 convictions qualified as serious or violent felonies within the meaning of the Three Strikes law. However, he argues that his conviction for violation of section 246.3 does not qualify as a “strike.” He complains that, “[b]ecause it is not possible to determine from the appellate record whether Zamora’s sentence was a function of this erroneous finding,” the finding must be stricken and the matter remanded for resentencing. He also complains that the court’s finding may cause a delay in his parole as a result of the “erroneous finding.”

The Three Strikes law defines violent felonies as those listed in section 667.5, subdivision (c), and serious felonies as those listed in section 1192.7, subdivision (c). (§ 667, subd. (d)(1).) Violation of section 246.3, the discharge of a firearm or BB gun in a grossly negligent manner, is not expressly listed in either section. However, under sections 1192.7, subdivision (c)(8) and 667, subdivision (c)(8), a serious or violent felony includes any felony in which the defendant personally used a firearm. Therefore, conviction of section 246.3 constitutes a strike if the defendant personally used a firearm in commission of the offense. (*People v. Golde* (2008) 163 Cal.App.4th 101, 111-112; *People v. Leslie* (1996) 47 Cal.App.4th 198, 201.) It is possible to be convicted of grossly negligent discharge of a firearm under section 246.3 without personally using a firearm, for example, as an aider and abettor. (*People v. Golde, supra*, at p. 112.) In the instant case, the parties do not point to any evidence in the record establishing Zamora personally used a firearm in the prior offense, and the trial court did not make such a finding. Zamora is therefore correct that the evidence was insufficient to support the trial court’s finding that the section 246.3 conviction constituted a strike.

Nonetheless, remand for retrial or rehearing is not required. Even without the section 246.3 conviction, Zamora was already subject to sentencing as a “third strike” defendant under the Three Strikes law. (See §§ 1170.12, subd. (c)(2)(A) & 667, subd. (e)(2).) Zamora’s assertion that “it is not possible to determine from the appellate record whether [his] sentence was a function of this erroneous finding” is not persuasive. There is no question that the People proved Zamora had suffered two strikes, subjecting

him to the same sentence as if he had suffered all three alleged priors. Sentencing under the Three Strikes law was mandatory, not optional. “ ‘[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.’ [Citation.] To achieve this end, ‘the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.” ’ [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Consistent with the language of and the legislative intent behind the Three Strikes law, our Supreme Court has “established stringent standards that sentencing courts must follow in order to find such an exception.” (*Ibid.*) The Three Strikes law “not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so.” (*Id.* at p. 378.) Zamora did not bring a *Romero* motion<sup>7</sup> below, and nothing in the record remotely suggests such a motion would have succeeded. Thus, Zamora would have received the same sentence even in the absence of the court’s finding that the section 246.3 conviction was a strike.

There is likewise no merit to Zamora’s contention that the court’s finding might improperly delay his parole. Zamora points to California Code of Regulations, title 15, section 2286, subdivision (c), which provides that the Board of Parole Hearings may enhance an inmate’s base term “for prior felony convictions.”<sup>8</sup> However, the regulation

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<sup>7</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

<sup>8</sup> The regulation provides: “An enhancement should be added to the base term for prior felony convictions as specified in this subsection, regardless of whether the prior felony conviction or prison term was pled and proven. The panel may add less than the determinate enhancement if the prior felony conviction or prison term was not pled and proven. In adding enhancements under this subsection, the panel should consider the

does not distinguish between prior strike or non-strike felony convictions. Thus, the trial court's finding could have no effect in this context. Remand is not required.

3. *Contentions regarding various fines and penalties.*

At sentencing, the trial court imposed the following fines and penalties: (1) a \$10,000 restitution fine (§ 1202.4, subd. (b)); (2) a \$10,000 suspended parole restitution fine (§ 1202.45); (3) a \$20 court security fee (§ 1465.8, subd. (a)(1)); (4) \$5,425.51 in restitution to the victim's mother, Hortencia Alvarez (§ 1202.4, subd. (f)); (5) \$5,000 to the Victim Compensation Board; and (6) a \$5,010 court construction fine (Gov. Code, § 70372).

a. *Court construction fine and additional penalties.*

Government Code section 70372, subdivision (a)(1), states: "Except as otherwise provided in subdivision (b) of Section 70375 and in this article, there shall be levied a state court construction penalty, in the amount of five dollars (\$5) for every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including, but not limited to, all offenses involving a violation of a section of the Fish and Game Code, the Health and Safety Code, or the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. This penalty is in addition to any other state or local penalty, including, but not limited to, the penalty provided by Section 1464 of the Penal Code and Section 76000 [of the Government Code]." Subdivision (a)(3) of the statute further provides in pertinent part: "This construction penalty does not apply to the following: [¶] (A) Any restitution fine."

Under the plain language of the statute, imposition of a court construction fee could not be based on the restitution fine, suspended parole restitution fine, or victim restitution orders. (See *People v. Walz* (2008) 160 Cal.App.4th 1364, 1372.) The parties agree that, pursuant to Government Code section 70372, read in conjunction with

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date of the prior conviction and the length of time between release from custody and subsequent convictions if the prisoner has never been placed in custody. The period of confinement shall not be increased for convictions or prior prison terms resulting from convictions that have been reversed in court or pardoned by the executive."

Government Code section 70375, the trial court should have imposed a \$6 court construction fee, i.e., \$3 for each \$10 of the court security fee imposed. (See *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1252-1254.) Accordingly, we order the \$5,010 court construction fee reduced to \$6. (See *People v. Scott* (1994) 9 Cal.4th 331, 354 [unauthorized sentence may be corrected on appeal even absent objection below].)

The People urge that, in addition to the \$6 court construction fee, the trial court should have imposed a \$20 state penalty pursuant to section 1464, subdivision (a); a \$14 county penalty pursuant to Government Code section 76000, subdivision (a)); and \$2 DNA penalties pursuant to Government Code sections 76104.6, subdivision (a) and 76104.7, subdivision (a). We agree. These penalties were mandatory and we may correct their omission even though the issue was first raised on appeal. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1156-1157; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530.)

b. *Zamora has forfeited his claim that the trial court abused its discretion by ordering payment to the Victim Compensation Board.*

At sentencing, the trial court queried whether there was “an issue of restitution to the victim?” The prosecutor responded: “There is, Your Honor. It is the same as what we ordered with respect to defendant Martinez, joint and several, in the amount of \$5,425.50, payable to Hortencia Alvarez; and \$5,000 to the Victim Compensation Board.” Zamora did not object or request a hearing.

Zamora now contends that the trial court abused its discretion by ordering restitution to be paid to the Victim Compensation Board without requiring documentation of the amount due. He points to section 1202.4, subdivision (f)(4)(B), which states: “The amount of assistance provided by the Restitution Fund shall be established by copies of bills submitted to the California Victim Compensation and Government Claims Board reflecting the amount paid by the board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Certified copies of these bills provided by the board and redacted to protect the privacy and safety of the

victim or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that those bills were submitted to and were paid by the board, shall be sufficient to meet this requirement.” He asserts that the trial court erred by relying on the prosecutor’s mere representation that \$5,000 was an appropriate amount, in the absence of documentary evidence or testimony supporting that conclusion.

We observe that the portion of the statute cited by Zamora does not assist him, in that it appears to pertain, not to the documentation that must be provided to the trial court when making a restitution award, but to documentation that a victim must provide to the board to obtain assistance. In any event, Zamora has failed to preserve this issue for appeal, because he failed to object or request a hearing below. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [defendant forfeited his claim that a restitution order was unwarranted where the victim’s loss was not documented or supported by sworn testimony, where he failed to object below]; *People v. Smith* (2001) 24 Cal.4th 849, 852.) “As the order for restitution was within the sentencing court’s statutory authority, and defendant neither raised an objection to the amount of the order nor requested a hearing to determine it . . . , we do not decide whether the court abused its discretion in determining the amount.” (*People v. Brasure, supra*, at p. 1075; see also *People v. Scott, supra*, 9 Cal.4th at p. 356.)

## DISPOSITION

The judgment is modified by reducing the court construction fee from \$5,010 to \$6. (Gov. Code, §§ 70372, 70375). The judgment is further modified by imposing a \$20 state penalty (§ 1464, subd. (a)); a \$14 county penalty (Gov. Code, § 76000, subd. (a)); a \$2 DNA penalty (Gov. Code, § 76104.6, subd. (a)); and a \$2 state-only DNA penalty (Gov. Code, § 76104.7, subd. (a)). The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections. In all other respects, the judgment is affirmed.

## NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.